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VIRGINIA LAW REGISTER.

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As we go to press, the death is announced of Judge John W. Riely, of the Supreme Court of Appeals of this State. We unite with the entire bar of the State in deploring the loss of so excellent a judge and so splendid a specimen of Virginia manhood.

As a lawyer at the bar, Judge Riely was well known throughout the commonwealth, for his knowledge of the local law of Virginia. His work as one of the Revisors of the Code of 1887, in collaboration with the late Judges E. C. Burks and Waller R. Staples (both of honored memory), won for him still greater reputation. As soon as it was known that he would accept judicial station, his elevation to the Supreme bench was regarded as a foregone conclusion.

During his brief career of less than six years on the bench, he earned the admiration and respect of the bar for his patience to hear and his intelligent appreciation of argument; for his industry in the investigation of truth; and for the fullness, accuracy and clearness of his opinions. Judge Riely prepared his opinions with scrupulous care. In them one finds no disposition to evade hard questions, or to ignore arguments difficult to answer. On their face they indicate the author's close companionship with books, and a keen pursuit of the authorities. In proportion to the time he occupied judicial station, no Virginia judge has, in our opinion, made more valuable contributions to, or a more lasting impression upon, the jurisprudence of this State, than he to whom we pay this brief and imperfect tribute.

Judge Riely possessed a judicial poise, a graciousness of manner, a modesty of bearing, a nobility of character, and a sweetness of temper in rare combination. No one came in contact with him but felt the subtle charm of his presence—the influence of that nameless something which a generous and loveable manhood universally exerts.

We hope at an early day to publish a more worthy tribute to Judge Riely's memory.

IN *May* v. *New Orleans*, 20 Sup. Ct. 976, the Supreme Court of the United States wrestles with the vexed question as to what is an "original package" under the doctrine established in *Brown* v. *Maryland*, 12 Wheat. 419, that an importer who sells in original packages cannot be subjected to the payment of a license tax for the privilege of selling his importations, nor to a tax on the goods themselves, so long as the original package is unbroken.

The proof was that the foreign manufacturers of the goods imported by the appellant (chiefly dry goods and notions) put up the goods in packages, boxes or cartons of various sizes, according to the nature of the article, and, when shipped, a number of these packages, boxes or cartons were packed in large shipping cases. When the goods arrived they were removed from the shipping cases, placed in stock, and sold to customers, in the manufacturers' unbroken packages.

The contention by the importer was that the "original package" was the inner package, box or carton, in which the manufacturer primarily placed the goods, and not the larger case in which they were shipped. The court held, Mr. Justice Harlan delivering the opinion, that the latter was the original package, and not the smaller inner packages, thus overruling the importer's contention. Mr. Chief Justice Fuller, Mr. Justice Brewer, Mr. Justice Shiras and Mr. Justice Peckham dissented.

Any other rule, as stated by the court, would permit every merchant, who sells only goods of foreign manufacture in separate packages, to enjoy the protection of the local government and yet escape all taxation, provided he takes care to have the imported articles separately wrapped and each article placed in a box or case to itself, howsoever small the case—as, for example, Geneva watches or diamond rings. The construction seems sound.

IN the case of *Ward* v. *Reasor*, 2 Va. Sup. Ct. Rep. 371, the Supreme Court of Appeals of this State sustains a demurrer to a declaration in an action for the malicious prosecution of a criminal proceeding, because the declaration alleged that the magistrate before whom the accused was brought for trial, dismissed the proceeding "without hearing any evidence." There were the usual allegations of malice, want of probable cause, and termination of the prosecution favorably to the accused.

The action of the magistrate (who had jurisdiction to try the mis-

demeanor with which the accused was charged) was tantamount, as held by the court, to the entry of a *nolle prosequi*, and the court decides squarely, that where a prosecution is so ended, no action for malicious prosecution can be maintained.

When one considers the practical effect of such a rule of law, he may well doubt its soundness in reason, and may well question any supposed authority upon which it rests. It means that the more malicious and inexcusable the charge preferred, the more secure from an action for damages is the person who prefers it. If the accusation have enough of apparent foundation to warrant the prosecuting attorney in pressing it to a trial and to a conclusion, the accused person, if acquitted of the charge, may maintain an action against his accuser, on proof of malice and want of probable cause; but if the charge be so palpably without foundation that the public prosecutor abandons the prosecution and enters a *nolle prosequi*, the law affords no redress for the outrage thus perpetrated upon the accused. Under this rule of law, an innocent citizen who has been arrested on a serious charge, on a warrant sworn out from purely malicious motives and without any probable cause, and who has been led, it may be, handcuffed through the public streets to prison, where he may have languished as the companion of thieves, is denied redress, unless the public prosecutor, over whom he has no control, regards the evidence against him strong enough to justify a prosecution of the charge to a conclusion. If the charge be so transparently malicious as to necessitate the entry of a *nolle prosequi*, the accused is without civil redress.

If such is the law, it is a reproach to our civilization.

The case of *Jones* v. *Finch*, 84 Va. 204, while the opinion is unsatisfactory in some respects, is distinct authority to the contrary; and the doctrine enunciated in the principal case has been rejected in every State of the Union in which it has come up squarely for decision.

The court in the principal case distinguishes *Jones* v. *Finch* on the ground that in that case the dismissal was "after hearing evidence." But, as the dismissal was on a preliminary hearing by a United States commissioner, with no jurisdiction to try the case, the fact that he heard evidence is immaterial to the question of the termination of the prosecution. There was no acquittal—no judgment which might have been pleaded in bar of a subsequent prosecution. The action of the commissioner, therefore, had precisely the same effect upon the prosecution as that of the magistrate in the principal case. In neither case

was the action of the commissioner or magistrate an acquittal, yet in each it ended that prosecution beyond recall. As will be shown presently, the circumstance that further prosecution of the accused was possible is not material, since any subsequent prosecution would be a new proceeding and not a continuation of the old.

Courts and text-writers occasionally confound the result of the entry of a *nolle prosequi*, or a dismissal by a magistrate, as constituting a *conclusion of the prosecution*, with the effect of a *nolle prosequi* or a dismissal, as affording *evidence of want of probable cause*—a confusion apparent in the opinion in *Womack* v. *Circle*, 32 Gratt. 324, 334; in *Jones* v. *Finch* (*supra*), and in the principal case also. The method by which the prosecution is terminated, provided it result in the discharge of the accused, and is final as to that prosecution, does not touch the question of *probable cause*, and is not alleged or proved for that purpose; it concerns only the question of the *finality of the proceeding*. Even though acquitted on the merits, the accused must still prove, in his subsequent civil action, want of probable cause, by independent evidence. "The chief if not the only object," says Burks, J., in *Scott* v. *Shelor*, 28 Gratt. 891, 898–899, "of introducing the verdict on the former trial, is to show that the prosecution is ended; and if the verdict of acquittal is evidence at all of the want of probable cause, it must be very slight and inconsiderable." The authorities appear to be unanimous on this point. *Stewart* v. *Sonneborne*, 98 U. S. 187, and cases cited. The authorities are collected in note 26 Am. St. Rep., at p. 155.

In addition to malice and damage, the two prime essentials of an action for malicious prosecution are (1) *Want of probable cause*, and (2) *Termination of the prosecution favorably to the accused.* The first —want of probable cause—is proved, as shown, not by a discharge, or even an acquittal, but by any competent, independent evidence that the plaintiff may be able to introduce at the trial, and, although a negative, the burden is on him to establish it. The plaintiff does not allege, nor is he required to allege, in his declaration, the evidence by which he proposes to establish want of probable cause. In the principal case, however, the allegation that the prosecution was dismissed, is incautiously treated as if it were relied upon as establishing want of probable cause—with no reference to or discussion of the effect of such dismissal as a *termination of the prosecution*—and the court holds that, as the dismissal does not establish want of probable cause—which it clearly does not—the declaration is demurrable. "This action" [the

dismissal by the justice], says the court, " . . . was the equivalent of a *nolle prosequi*—nothing more—and could not establish the innocence of the defendant in error, nor show want of probable cause for the prosecution." The pleader, of course, alleged the dismissal, not to establish "want of probable cause," but as an averment of the "termination of the prosecution." The declaration having distinctly alleged want of probable cause, the question whether this could be actually established or not did not arise upon the demurrer, being a matter of evidence only.

If there were any defect in the declaration, then, it was in the allegation that the dismissal *terminated the prosecution.* This brings us to consider the second of the essentials named, viz., the "finality of the prosecution," and, more narrowly, whether a dismissal by a magistrate, or a *nolle prosequi,* is a sufficient termination of the prosecution to lay the foundation for a civil action.

We have seen that on principle it must be so, else the greater the outrage the more certain the impunity of the wrong-doer. So far as authority goes, it has already been intimated that the authorities are practically all in accord with the principle—namely, that in order to maintain the action for malicious prosecution the plaintiff *need not allege an acquittal;* but it is sufficient to allege a *termination of the pending prosecution*—and whether the finality arise out of an acquittal, an *ignoramus* by a grand jury, the entry of a *nolle prosequi,* or a discharge by a trying or committing magistrate, is immaterial, provided that particular prosecution is at an end.

The purpose of requiring allegation and proof of the termination of the prosecution is to avoid the litigation of the same thing at the same time in separate proceedings. So long as the criminal action is pending, the innocence of the accused cannot be litigated in the civil action—since the accused may eventually be found guilty in the criminal proceeding; and, if guilty, no civil action can be maintained. This being the reason for allegation and proof of the finality of the prosecution, it follows that the manner of its ending is immaterial, provided it be finally terminated in favor of the prisoner. See Bishop, Non-Contract Law, 246. Proof of an acquittal sustains, as shown, but one allegation of the declaration, namely, that *the prosecution is concluded.* It is equally concluded by a dismissal or the entry of a *nolle prosequi.* There is no reason, therefore, for making any distinction between an acquittal and a dismissal, whether the latter be before or after hearing evidence.

The propositions stated are sustained by the authorities generally. The authorities relied upon by the court in the principal case are certain well-known text-writers, viz., Greenleaf, Hilliard, Minor and Barton, several *dicta* from previous Virginia cases, and the Massachusetts case of *Bacon* v. *Towne*, 4 Cush. 217.

Greenleaf's statement supports the view adopted by the court. It is based, however, on early English cases, without the citation of American authority, and these in turn are based on the ancient English statute of "Malicious Appeals," Westm. 2, c. 12 (13 Edw. I.), out of which actions for malicious prosecution originally grew, and which provided that if any person be accused of a felony, and "doth *acquit* himself in the King's Court, in due manner," etc., he shall have his action for damages. Bigelow on Torts, 88.

Prof. Minor's statement is based solely on Hilliard, and on a *dictum* in *Scott* v. *Shelor*, 28 Gratt. 891, 898, which is itself based on Hilliard.

Mr. Barton relies upon Mr. Minor's statement.

So that if there be error in these authorities, it may be traced solely to Hilliard on Torts. Unfortunately we have not access to that work, and cannot therefore verify the authorities upon which it relies.

As to *Bacon* v. *Towne*, 4 Cush. 217—the only decision relied upon by the court: This case has been the source of most of the confusion existing in the books in connection with actions for malicious prosecution. It was thought to have established the doctrine in Massachusetts that a *nolle prosequi* is not a sufficient termination of the prosecution to sustain a civil action, and it was followed in that State in several subsequent cases. But the doctrine it was thought to have established has since been re-examined by the Massachusetts court, and the doctrine, as a general proposition, overturned, by limiting it to the case where the *nolle prosequi* is entered *by the procurement or consent of the accused.* See *Graves* v. *Dawson*, 130 Mass. 78, 39 Am. Rep. 429; s. c. 133 Mass. 419; and *Langford* v. *Boston, etc. R. Co.*, 144 Mass. 431.

Mr. Bishop says on this subject:

"If, on motion of the State's attorney, the case is stricken from the docket, with leave to reinstate it, the defendant is not discharged from the indictment, and a suit for malicious prosecution will be premature. But a *nolle prosequi* ends the indictment past recall, and thereupon the right to a malicious-prosecution suit is perfected—a proposition from which a few of our courts, misapprehending the effect of a *nolle prosequi*, have dissented, making distinctions not necessary to be pointed out here—"

—citing, for the latter, the Massachusetts cases referred to above, and a Maine case referred to below. Bishop, Non-Contract Law, 248.

Continuing the same author says:

"Only the particular proceeding need be at an end, it being immaterial that the party is subject to a new one. A criminal prosecution, said a learned judge, 'is terminated, 1, Where there is a verdict of not guilty; 2, Where the grand jury ignore a bill; 3, Where a *nolle prosequi* is entered; and 4, Where the accused has been discharged from bail or imprisonment.' . . . . A discharge by the examining magistrate will suffice." Id. 248–249.

Mr. Freeman examines this question with his accustomed fullness and ability, in a monographic note to *Ross* v. *Hixon* (Kan.), 26 Am. St. Rep., 135–136. The authorities are there collated, and it would be an affectation of learning to cite them here. His conclusion is that it is immaterial how the prosecution came to an end, if it is in fact ended; and the circumstance that a new prosecution may be set on foot for the same offence is without consequence. The few cases apparently *contra* (the Massachusetts cases already noticed, and the case of *Garing* v. *Fraser*, 76 Me. 37, exhausting the list) he disposes of as based on peculiar facts, and the actual decisions therein as not opposed to the general doctrine stated.

The same view is presented, on a full review of the authorities, in 14 Am. & Eng. Enc. Law (1st ed.), 28–31.

The principal case would seem, therefore, to be opposed, not only by sound reason, but by an unbroken line of American authority.

The REGISTER derives no pleasure, and possibly less favor, in criticizing the opinions of the Court of Appeals. But the journal is conducted in the interest of the law as a science, and it regards it a bounden duty to itself and to its constituents, to point out what seems to be error, from whatever source it may emanate.